

FACTUAL HISTORY

The decedent, A.F. (a.k.a. A.W.), born May 11, 1926, worked as an ordinary seaman with the Military Sea Transportation Service (MSTS) during the early 1950's.² He died January 23, 1998. The death certificate identified metastatic lung cancer as the immediate cause of death.³

On July 16, 1998 appellant filed an occupational disease claim on behalf of her deceased husband's estate.⁴ The claim alleged that the decedent had been exposed to asbestos during his employment with MSTS, which ended March 11, 1955. More than four decades passed before the decedent first realized his asbestosis and lung cancer were related to his federal employment.

In a December 12, 1997 report Dr. Bernard Eisenstein, a Board-certified internist, diagnosed, among other conditions, pleural asbestosis and metastatic lung cancer. He attributed the employee's lung cancer to "significant asbestos exposure while a [m]erchant [s]eaman."⁵

By letter dated June 18, 1999, the Office advised appellant that the claim had been accepted for asbestosis, with a March 2, 1955 date of injury.

On June 6, 2003 appellant's counsel filed a claim for death benefits (Form CA-5). Dr. Charles C. McDonald, a Board-certified internist specializing in pulmonary disease, reviewed the decedent's medical records at the Office's request. In a report dated April 3, 2006, he found that the employee died due to complications of his lung cancer, which was due to a "heavy history" of cigarette use. According to Dr. McDonald, the employee did not die as a result of an asbestos-related condition.

The Office denied appellant's death benefits claim by decision dated June 7, 2006. The Office found that the medical evidence did not demonstrate that the employee's death was either caused by asbestosis or was the direct result of an asbestos-related condition.

On June 4, 2007 appellant's counsel sought reconsideration on her behalf. Counsel requested that Dr. McDonald's report be disallowed, presumably because the Office had not responded to his June 13, 2006 document request. Counsel also noted that the employee had asbestosis and died from lung cancer, and that the two were related.

In a decision dated June 15, 2007, the Office denied appellant's request for reconsideration.

² The MSTS was later renamed the Military Sealift Command.

³ Chronic bronchitis and atherosclerotic lung disease were listed as other conditions that contributed to the employee's death.

⁴ According to the terms of the decedent's will, appellant was appointed Executrix and the Bergen County (N.J.) Surrogate's Court issued her Letters Testamentary on March 5, 1998.

⁵ Dr. Eisenstein reported an ongoing cigarette smoking history of 1½-packs per day over 55 years. Although he attributed the lung cancer to asbestos exposure, Dr. Eisenstein also indicated that there "probably" was a significant contribution by the employee's "heavy smoking over so many years."

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.⁶ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁷ When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

Appellant's June 4, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.⁹ Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁰ Appellant also failed to satisfy the third requirement under section 10.606(b)(2). She did not submit any relevant and pertinent new evidence with her June 4, 2007 request for reconsideration and, therefore, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).¹¹ Because appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the June 4, 2007 request for reconsideration.

⁶ 5 U.S.C. § 8128(a) (2000).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

⁹ Counsel offered no legitimate reason for disallowing Dr. McDonald's April 3, 2006 report. The record indicates that, in response to his June 13, 2006 document request, the Office forwarded counsel a complete copy of the case file on June 22, 2006.

¹⁰ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

¹¹ 20 C.F.R. § 10.606(b)(2)(iii).

CONCLUSION

The Office properly denied further merit review of appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 27, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board